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SUPREME COURT OF THE UNITED STATES

ALAMO EXPRESS INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., and SOUTH-WESTERN MOTOR TRANSPORT, INC., *Appellants*

vs.

THE UNITED STATES OF AMERICA, THE INTER-STATE COMMERCE COMMISSION and CENTRAL FREIGHT LINES, INC., W. W. CALLAN and INLAND MOTOR FREIGHT LINES, INC., *Appellees*

On Appeal From No. 3485 in the United States District Court for the Western District of Texas, San Antonio Division

Jurisdictional Statement

Appellants appeal from the judgment of the United States District Court for the Western District of Texas, entered May 18, 1965 pursuant to decision of the three-judge district court of March 20, 1965, upholding as valid orders of the Interstate Commerce Commission sought to be set aside, affirming such orders of the Commission, and dissolving the temporary injunction theretofore issued by such court against giving effect to such orders.

OPINION BELOW

The opinion of the District Court for the Western District of Texas, San Antonio Division, is reported in 239 F. Supp. 694. The first report and order of the Interstate Commerce Commission by Division 3, of

January 11, 1963, is reported in 90 M.C.C. 777. The order of the Commission by Division 3, acting as an Appellate Division of July 23, 1963, is unreported. The report and order of the Commission on Reconsideration, by Division 3, acting as an Appellate Division, of November 15, 1963, is reported in 93 M.C.C. 411. The Second Report of the Commission on Reconsideration, by Division 3, acting as an Appellate Division, of June 29, 1964, is reported in 97 M.C.C. 249. The order of the Commission by Division 3, acting as an Appellate Division, of October 20, 1964 is unreported. Copies of such opinion, reports, and orders are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. §1336, 1398, 2321, et seq., and 5 U.S.C. §1001 et seq., to set aside related orders of the Interstate Commerce Commission approving and authorizing under 49 U.S.C. §5(2)(a) the acquisition of control through management and ownership of the capital stock of one motor carrier by another. The opinion of the District Court was dated March 20, 1965, and was considered by Appellants as self-executing as to judgment. However, a judgment in conformity therewith was entered May 18, 1965. Notice of Appeal was filed in that court on May 18, 1965 and a Corrected Notice of Appeal (to give effect to the judgment of May 18, 1965) was filed June 7, 1965, so that the Notice was timely filed. A Supplemental Notice was given on June 16, 1965 to indicate that Alamo Express, Inc. is a party to the appeal, so that the appellants are identical with the

plaintiffs below. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Capital Transit Company*, 325 U.S. 357; *United States v. Detroit and Cleveland Navigation Company*, 326 U.S. 236; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515.

QUESTIONS PRESENTED

1. Whether the order of the Commission of July 23, 1963 was a final order, as defined in 49 U.S.C. §17(9).

2. Whether the jurisdiction of the Commission in MC-F-7882 was terminated by the entry of the order of July 23, 1963, though it may have continued in MC-F-7682.

3. Whether the order of the Commission of June 29, 1964 waiving Rule 1.101(e) of the Commission's General Rules of Practice and permitting the filing of a petition for reconsideration by applicants—respondents in MC-F-7882, as well as MC-F-7682, was in excess of statutory authority, limitations, and jurisdiction.

4. Whether the order of the Commission of June 29, 1964 reconsidering the proceeding in MC-F-7882 was in excess of statutory authority, limitations, and jurisdiction.

5. Whether the order of the Commission of June 29, 1964 permitting the filing of a petition for reconsideration by applicants—respondents in MC-F-7882

was in excess of statutory authority, limitations, and jurisdiction, and constituted an abuse of discretion because contrary to Rule 1.101(f) of the Commission's General Rules of Practice prohibiting successive petitions for reconsideration on substantially the same grounds.

6. Whether the orders of the Commission of June 29, 1964 and October 20, 1964 are arbitrary, unreasonable, capricious, void, and constituted an abuse of discretion by the Commission, because:

(a) There had been an objectionable split-off of interstate and intrastate rights, which resulted in the creation of duplicate operating rights, and, as a result thereof, the approval of the control of the operating rights herein would require proof of public convenience and necessity.

(b) There was no substantial evidence to support the finding that the operating rights sought to be controlled were not dormant.

(c) The grant of authority was not properly conditioned upon the cancellation of all operating authority sought to be controlled, except between San Antonio, Houston, Corpus Christi, Bishop, and Aransas, Texas.

(d) Total dormancy of the operating rights sought to be controlled existed as a matter of law.

(e) The grant was not conditioned upon the cancellation of rights sought to be controlled which are duplicative with those of Central Freight Lines, Inc., Southwestern Motor Tran-

sport, Inc., and Alamo Express, Inc., although applicants agreed thereto.

(f) They are predicated upon an inferential representation by Central Freight Lines, Inc. that it will be successful in its lawsuit pertaining to the acquisition of control of Alamo Express, Inc., whereas in *Walker v. Central Freight Lines, Inc.*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), Writ Denied, N.R.E., the issue of the acquisition of control by Central of Alamo Express has been finally adjudicated against Central by the Texas courts.

(g) They are predicated upon representation that there is no market for the interests unlawfully acquired in the carrier sought to be controlled, although there is no evidence with respect thereto, nor as to what efforts have been made to market such interests.

(h) They are predicated upon a finding relative to negotiations relating to purchase of reversionary rights of the split-off intrastate rights coextensive with the interstate rights sought to be controlled, but there is no evidence with respect thereto.

(i) Applicants did not establish the statutory criteria required by 49 U.S.C. §5 for the approval of the control application.

STATEMENT

Central Freight Lines, Inc., a motor common carrier, herein called Central, and W. W. Callan, controlling Central as its principal stockholder and chairman of its board of directors, unlawfully acquired control and management of Inland Motor Freight Lines, Inc., also a motor common carrier, herein called Inland, contrary to Sec. 5, Interstate Commerce Act, 49 U.S.C. §5. Such is the finding and conclusion of the Interstate Commerce Commission, herein called Commission, in each of the three reports of the Commission, by Division 3, of January 11, 1963, November 15, 1963, and June 29, 1964, and such finding and conclusion has not been attacked.

The Commission instituted its proceeding in MC-F-7682, *Central Freight Lines, Inc.—Investigation of Control—Inland Motor Freight Lines, Inc.* under 49 U.S.C. §5(7) to determine whether the control or management of Inland in a common interest with Central may have been effectuated and may be continuing in violation of 49 U.S.C. §5(4).

Before the finality of MC-F-7682 and while it was pending after hearing, the application in MC-F-7882, *Central Freight Lines, Inc.—Control—Inland Motor Freight Lines, Inc.* was filed seeking authority under 49 U.S.C. §5(2) for Central to acquire control of Inland through purchase of its outstanding capital stock, and for Callan to acquire control of Inland through the same transaction. Appellants Red Arrow Freight Lines, Inc., herein called Red Arrow, and Brown Express, Inc. supported the position of the Commis-

sion in MC-F-7682, and all appellants opposed the transaction in MC-F-7882. The proceedings in MC-F-7682 and MC-F-7882 were disposed of by the Commission in the same reports and orders.

After the filing of the application in MC-F-7882, Central sought and was granted temporary authority to control Inland through management under 49 U.S.C. §310a(b).

Inland, a Texas corporation, was formerly known as J. H. Robinson Truck Lines, Inc., such Inland entity being a mere change in corporate name. Prior to the change in corporate name, Inland leased its intrastate rights corresponding to the interstate rights now held by it to Alamo Express, Inc. and Southwestern Motor Transport, Inc., herein called SMT, on long-term bases. Alamo Express and SMT registered such intrastate rights under the second proviso of 49 U.S.C. §306(a)(1) (now succeeded by 49 U.S.C. §306(a)(7)(B) under the terms of which Certificates of Registration are issuable) and have engaged in operations in interstate and foreign commerce. This is the manner by which there was a split-off of interstate and corresponding intrastate operating rights. Thereafter, Inland went into state receivership and J. H. Robinson acquired the reversionary interest in such rights so leased to Alamo Express and SMT. 90 M.C.C. 777. See also *Yellow Transit Freight Lines, Inc. — Purchase (Portion)—Inland Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 M.C.C. 775. Such rights of J. H. Robinson, deceased, passed to his widow, Mrs. J. H. Robinson. See report of June 29, 1964, 97 M.C.C. 249.

Three separate reports and orders, and two separate orders, were issued by the Commission, by Division 3, as pertinent herein:

(1) On January 11, 1963, 90 M.C.C. 777, it (a) denied the application in MC-F-7882 upon the basis of the Commission's prior holdings (involving the same Inland carrier) in *Yellow Transit Freight Lines, Inc. — Purchase — Inland Motor Freight Lines*, 65 M.C.C. 775, that where, as here, there had been a severance of interstate and corresponding intrastate rights, theretofore operated by a single carrier, which might or had resulted in the creation of two rights, in place of one, to operate in interstate or foreign commerce over the same highways and between the same points, the proposal may not be sanctioned in the public interest;[1] (b) found in MC-F-7682 the control or management of Inland in a common interest with Central to have been effectuated in violation of 49 U.S.C. §5(4), but that such violation terminated with the grant of temporary authority, and directed respondents "to dispose of all of their interest, direct or indirect, in Inland or in any of its stock."

(2) Thereafter, applicants — respondents filed a petition for reconsideration of the report and order of the Commission of January 11, 1963 in both MC-F-7882 and MC-F-7682, and appellants replied. By order of July 23, 1963, the Commission (a) found that the conclusions in the report of January 11, 1963 "with

[1]In view of its conclusion reached, the Commission therein held that whether some modification of the operating authority of Inland would be in order on the basis that certain portions are dormant need not be determined.

respect to No. MC-F-7882 are based on adequate findings supported by the record, and that there has been presented no error of fact or law with respect to the findings and conclusions therein which warrant reconsideration"; (b) ordered that MC-F-7682 be reopened for reconsideration on the present record; (c) ordered that said petition be denied in all other respects; and (d) ordered that the effective date of the order of January 11, 1963 in MC-F-7882 be postponed pending further order therein, for the obvious purpose of ultimately making the orders in MC-F-7682 and MC-F-7882 simultaneously effective.

(3) By report and order of November 15, 1963, 93 M.C.C. 411, the Commission, on the basis of *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, modified the divestiture requirement of MC-F-7682 to provide that "respondents should be free to employ any lawful means to prevent further violation upon the termination of temporary authority in No. MC-F-7882,[1] rather than be limited exclusively to divestiture." No modification was made herein of the prior denial in MC-F-7882, but such denial was final by the order of July 23, 1963.

(4) On January 14, 1964, after the time for filing of a petition for reconsideration had expired under Rule 1.101(e) of the Commission's General Rules of Practice, applicants—respondents filed a petition for waiver of Rule 1.101(e), which included a petition for extraordinary relief, for reconsidera-

[1]The temporary authority in MC-F-7882 would have expired simultaneous with the effectiveness of the order on permanent authority in MC-F-7882. 49 U.S.C. 310a(b) as modified by 5 U.S.C. §1008(b).

tion, for continuance of temporary authority, and for approval of MC-F-7882, to which appellants replied. The petition was a successive one, violative of Rule 1.101(f) of the Commission's General Rules of Practice, but no relief from that rule was sought nor granted. The Commission by report and order of June 29, 1964, 97 M.C.C. 249, the report being written by Commissioner Murphy who was *not* a member of Division 3 participating in the report and order of January 11, 1963, 90 M.C.C. 777, waived the provisions of Rule 1.101(e), accepted for filing the petition of applicants — respondents for reopening and reconsideration in MC-F-7882, reopened the proceedings in MC-F-7882 for reconsideration on the present record, and upon reconsideration granted and authorized the transaction in MC-F-7882. It found that (a) applicants contend that a final decision on the litigation as to Central's control of Alamo Express, Inc. is anticipated in 1964, inferring that it will favor Central's control; (b) applicants contend there is no market for the interests in Inland unlawfully acquired; (c) Central is willing to have its control of Inland conditioned upon the elimination of rights of Inland which are duplicative of those of Central, and of the leased intrastate rights of SMT and Alamo Express, but the Commission did not so condition the grant; (d) Central was negotiating for the reversionary rights of the split-off intrastate rights coextensive with Inland's interstate rights;[1] (e) the denial in MC-F-7882 was

[1]The matters found in (a)-(d), inclusive were not based on evidence. Further, (a) is clearly erroneous, as subsequently in *Walker v. Central Freight Lines, Inc.*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964) the Supreme Court of Texas denied an application for a writ of

predicated upon *Yellow Transit*, 65 M.C.C. 775, whereas *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511, not previously considered by the Commission, is dispositive of MC-F-7882, because in *Shein's* the separation was by strangers to the transaction, as here, whereas in *Yellow Transit* the separation was by "parties to the proceeding involved."[2] The factual error hereof is subsequently pointed out.

(5) Petitions for reconsideration of the report and order of June 29, 1964, 97 M.C.C. 249, were filed by appellants, to which applicants—respondents replied and by order of October 20, 1964 such petitions were denied.

The order of July 23, 1963 finally, and in all respects except as to its effective date, disposed of MC-F-7882 by denial 49 U.S.C. §17(9). The report and order of June 29, 1964 undertaking to grant reconsideration on the basis of a successively filed petition, violative of Rule 1.101(f) of the Commission's General Rules of Practice and which rule was not waived nor sought to be waived, is a nullity. 49 U.S.C. §17

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error, No Reversible Error, which decision denies to Central the control of Alamo Express. (c) above was not followed in such report and order.

[2]The Commission erroneously concluded:

> "Moreover, approval of the control case is a step in the direction of a possible permanent reunification of a significant part of the severed rights of Inland, and would thus be an improvement over the status quo."

The Commission's own report demonstrates that this was based upon petition representations, not evidence, and the fallacious nature thereof is demonstrated by *Walker v. Central Freight Lines, Inc.* 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), error refused, N.R.E., holding to the contrary of the implication of the representations.

(6). While this appears to be a matter for initial determination by this court, the matter has been previously determined to this effect by the Commission. *G. B. Zigler Co.*, 265 I.C.C. 539; *Hightower Box & Tank Co., Inc. v. Alabama, G.S.R. Co.*, 302 I.C.C. 20. Such order of July 23, 1963 was a final and appealable order under 49 U.S.C. §17(9). *Interstate Commerce Commission v. Cowan*, 127 F. Supp. 247. While conceivably the Commission *on its own motion*, might reopen a proceeding otherwise final, the vice herein is in the reopening after finality upon the successive petition of a party, violative of its own rules.

The District Court erroneously found that the Interstate Commerce Act, unlike the National Labor Relations Act, "gives the Commission a continuing jurisdiction over its orders, thereby allowing it to modify and even rescind a great number of them at any time" and that there is no "cut-off date, after which the Commission could not rescind or modify its orders," citing as authority *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Sprague v. Woll*, 122 F. 2d 128 (7th Cir. 1941), Cert. denied 314 U.S. 669, and *Erie R.R. Co. v. United States*, 59 F. Supp. 743, 64 F. Supp. 162 (S.D. Ohio 1945); but each of these cases involved a rehearing upon the basis of changed conditions under 49 U.S.C. §16a (recodified in 1940 as 49 U.S.C. §17(6)) and none give consideration to the specific language of such statute as herein applicable:

> "Such applications (referring to applications for rehearing, reargument or reconsideration) shall

be governed by such general rules as the Commission may establish."

Here, the Commission has established a rule applicable in this case which makes the order of July 23, 1963 a final order. Rule 1.101(a)(3) of the Commission's General Rules of Practice provides in part:

> "In proceedings . . . in which a division reverses, changes or modifies a prior decision by a hearing officer . . . a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and *with administrative* finality." (Emphasis added.)

In making the order of July 23, 1963 Division 3 acted in an appellate capacity and with administrative finality.

Herein, we have a successive petition violative of Commission Rule 1.101(f), not waived nor sought to be waived. Such cases so cited by the District Court are all predicated on *Baldwin*, which has been cited on this proposition only one other time by courts, in *A.T.&S.F. Ry. Co. v. United States*, 231 F. Supp. 422 (1964), wherein the Commission reopened upon its on volition. On the other hand, under *Butte v. A. & P. R. Co. v. United States*, 290 U.S. 127 (1933), the Commission may not, violative of its own rules, reopen a final proceeding on the motion of a party to correct an error of fact or law.

The Commission has long followed the rule that where, under the circumstances such as here present,

when there has been a separation of interstate and intrastate operating rights in such a manner that two resulting substantially identical interstate operations result, and a proposal is then made to sell the interstate certificate, in the absence of a public need for additional service, or a showing that the requirements of the shipping public are not being adequately met by existing carriers, the proposed transaction will be denied. *Navajo Freight Lines-Purchase (Portion)-Strickland Transportation Co.*, 75 M.C.C. 713, sustained *in Navajo Freight Lines v. United States*, 186 F. Supp. 377 (1960); *Southern Pacific Transport Co.-Purchase—Inland Motor Freight*, embracing *Yellow Transit Freight Lines, Inc.—Purchase (Portion)—Inland Motor Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 M.C.C. 775.[1]

No evidence was offered herein with respect to a public need for additional service nor that the requirements of the shipping public are not being adequately served, to the exclusion of Inland under the control of Central.

The reversal by the Commission, Division 3, of June 29, 1964 was predicated upon the finding that in the "prior decisions" herein, no consideration was given to *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc. supra:*[1]

> "In that case, as here, the separation of intrastate from interstate rights resulted in the creation of two interstate rights, where previously

[1]Involving the identical operating rights herein sought to be controlled.
[1]*Shein's Exp.–Purchase–Leo Smith Forwarding Co., Inc.*, 80 MCC 511 (Div. 4, Sept. 11, 1959).

one existed. It was established that none of the parties before the Commission in the *Shein's* case were responsible for the creation of the two rights. In the instant proceedings, the action of Inland in leasing its intrastate operating rights to Alamo and Southwestern was dictated by Robinson, who long since severed his connection with Inland. No representative of Robinson's estate, nor Alamo or Southwestern are here before the Commission as applicants and approval of the *control* case will not result in any benefit to any of them. In the absence of evidence to the contrary, or of any misconduct by Alamo or SMT, or their stockholders, the Commission has no authority to require them to discontinue operations under the proviso. *Shein's Exp—Purchase—Leo Smith Forwarding Co., Inc., supra.* The evidence here does not establish that either those persons who controlled Inland both prior to and following the sale of its stock to Gillen, or Central, conspired with Robinson to effect a separation of Inland's intrastate from its interstate operating rights."

The majority in *Shein's* concluded on this issue:

"Applicants herein are not to be penalized because the action of Smith-sons and the members of the Smith family in disposing of Ontario has resulted in the creation of two interstate operations where before there was only one. The situation here is distinguishable from the *Courier* case and other cases cited by protestants wherein the offending carriers were parties to the proceeding involved."

Thus, the Commission herein would ignore the resulting *vice* and permit of the creation of duplicate

operating rights, thereby nullifying the principle of the Commission that duplicate operating rights could not be created without proof of need for additional service.

But *Shein's* stands alone in a wilderness surrounded by a plethora of cases to the contrary, including the very *Yellow Transit* case which was a basis of the prior denial. Interesting enough is the fact that *Shein's* has been cited by the Commission in only two subsequent decisions, although it was decided in 1959, and both of those citations (87 M.C.C. 71 and 90 M.C.C. 668) are on issues other than that for which it is cited herein—interestingly enough, reaching a contrary decision to that reached by Division 3 in its order of June 29, 1964 on the issue of dormancy. The report accepts *Shein's* on the abrogation of the split-of-rights doctrine and ignores it on the dormancy issue. It would appear that if it is the law, it should be fully applied.

Furthermore, the split-of-doctrine rights so uniformly followed by the Commission has been continued to be followed subsequent to *Shein's* (1959) as is evidenced by the representations of the Commission to the court in *Navajo Freight Lines, Inc. v. United States*, 186 S. Supp. 377 (1960), as well as the subsequent decision in *Wilson Freight Forwarding Co.—Purchase—Hammel*, 90 M.C.C. 41, 43, (1962).

Shein's, standing alone, does not negate the general rule, but only would apply a different rule than that applied in "the *Courier* case, and cases cited therein." The quoted portion immediately before is the *sole*

basis for distinction, and therein the Commission did not undertake to overrule the other long line of cases, but only "the cases in *Courier* case, and cases cited therein", as is clearly seen at 80 M.C.C. 515. For example, it did not overrule nor negate the application of the *Yellow Transit* case which is directly applicable herein.

The Commission erred in finding with respect to applicants—respondents contention that Division 3 in the report and order of January 11, 1963 relied on the *Courier case*, 45 M.C.C. 688 in denying the application in MC-F-7882. The fact is that Division 3 in the report and order of January 11, 1963, relied upon the *Yellow Transit* case, 65 M.C.C. 775 in denying such application, and the *Courier* case is merely cited incidentally in the *Yellow Transit* case. In the *Yellow Transit* case, the vendor was a court appointed receiver, Brackney, as a matter of law a representative of the creditors of the bankrupt estate of Inland, a stranger to the separation of the intrastate and interstate operations, and the purchaser was *Yellow Transit*, a stranger to the separation of the intrastate and interstate operations. Yellow Transit in that transaction, stood in the same shoes as does Central in this transaction, a stranger to the transaction. The corporate entity, Inland, was involved in both transactions, but in the *Yellow Transit* transaction the sale was contemplated by Brackney, as receiver, an appointee of a State District Court for the benefit of creditors in a receivership proceeding. Brackney therein was no more the representative of Robinson than is Gillen in the instant transaction. Therefore,

on the matter of application of the split-of-rights doctrine the facts are identical and on all-fours with the factual situation involved in *Yellow Transit.*

Similarly, the District Court erred in assuming that the *Yellow Transit Case,* 65 M.C.C. 775, differed from the facts in MC-F-7882 as to the guilt of the parties as to the split-off doctrine. This factual error resulted in the District Court finding a basis for distinction in the application of the split-off doctrine in MC-F-7882 from that applied in *Yellow Transit,* 65 M.C.C. 775.

The orders complained of are further arbitrary, capricious, and void because total dormancy existed as a matter of law. The report of June 29, 1964 correctly found:

> "The finding in the *first* and *second prior reports* that the common control and management of Central and Inland had been effectuated is not contested by applicants-respondents in their pleadings here considered and will not be further discussed."

Clearly, therefore, from December 1, 1957 until terminated by the grant temporary control authority on September 5, 1961 Central and Callan were affiliated with each other within the meaning of Sec. 5(6) of the Interstate Commerce Act; and the control or management of Inland, or the power to control or manage such carrier, in a common interest with Central did exist and continued until terminated by the grant of such temporary control authority on September 5, 1961. In consequence thereof, there was a dor-

mancy in the lawful operation of Inland during such interim December 1, 1957 until September 5, 1961. See *Stewart-Investigation of Operations*, 87 M.C.C. 681, 697-8. Since there was a total dormancy of lawful operations by Inland, the control of the involved operating rights is not capable of being lawfully transferred in accordance with the precedents of the Commission against the transfer of dormant lawful operating rights, in the absence of a showing of a genuine need for the reactivation thereof. *Herrin Transportation-Purchase-Mobile Express Co.* (Ent. Comm., 1951), 58 M.C.C. 59.

It is immaterial that on and after September 5, 1961 the extent of the operations such as have been conducted have been lawful; those operations are immaterial in determining the dormancy existing herein as a matter of law, because operations conducted subsequent to the purchase agreement are entitled to little or no weight. *Cassens Transport Co.—Purchase—Speedway Transport*, 70 M.C.C. 370.

Further, the findings in the report of January 11, 1963 are that in the period prior to the grant of temporary authority on September 5, 1961, Inland performed only limited transportation, not making full utilization of its operating rights; nevertheless, the report of June 29, 1964, without making findings contrary to those in the report of January 11, 1963, concluded that there was no basis for a finding of dormancy in respect of portions of the rights of Inland. This latter finding, and the action of the Commission in ultimately approving MC-F-7882 without

conditioning the approval upon cancellation of the non-operated rights, was arbitrary, capricious, and void, as contrary to the Commission's precedents. *Murphy Motor Freight Lines, Inc.—Control and Merger*, 90 M.C.C. 535.

Even the *Shein's* case, so heavily relied upon by Division 3 and the report to June 29, 1964, required cancellation of the non-operated routes. *Gillette Motor Transport, Inc.-Control-Voss* (Div. 3, 1962), 90 M.C.C. 663 at 668 follows *Shein's* on the requirement for cancellation in this regard.

The District Court summarily disposed of this issue at two points in its opinion by merely concluding that the Commission's finding of no dormancy in the operation of Inland is supported by substantial evidence, without specifying the reasoning upon which such conclusion is based. The District Court failed to reason its failure to find total dormancy as a matter of law, or the partial dormancy as a matter of fact.

The violation of law in acquisition of control, in of itself, required the denial in MC-F-7882, and failure to so find constituted the orders complained of as arbitrary, capricious, and void. In the report of January 11, 1963, 90 M.C.C. 777, Division 3 found that unlawful control of Inland by Central and Callan had been effectuated in a common interest with Central, and that such was willful, because of the insolvency of Inland, its lack of adequate facilities, personnel and management to conduct efficient motor carrier operations, it was found that the violations were not in such disregard of the Interstate Commerce Act as

to warrant a conclusion that Central is unfit to acquire control of Inland. However, because of the fact that Division 3 in the report of January 11, 1963 otherwise found that the transaction in MC-F-7882 would not be consistent with the public interest, no petition for reconsideration with respect to such report of January 11, 1963 was filed by appellants as to the finding that the violations were not such as to render Central unfit. The report of November 15, 1963, 93 M.C.C. 411, did not deal with that issue. Hence, the issue of Central's fitness in connection with the application in MC-F-7882 was presented for answer for the first time in the petition for reconsideration of the report of June 29, 1964, and overruled in the order of October 20, 1964.

The Commission has repeatedly taken the position that unlawful operations bear on whether a transaction under 49 U.S.C. §5(2) is consistent with the public interest. *Neptune Storage Inc.—Purchase—E. H. Warren Co.*, 80 M.C.C. 238, (1959); *M. P. McLean—Control: McLean Trucking Co.—Purchase—A.C.A. Motor Lines, Inc.*, 60 M.C.C. 475, 486 (1954); *Hart v. ICC*, 226 F. Supp. 635 (U.S.D.C. Minn., 1964).

In the report of Division 3 of June 29, 1964 it was correctly found:

> "The finding in the *first* and *second prior reports* that the common control and management of Central and Inland had been effectuated is not contested by applicants-respondents in their pleading here considered and will not be further discussed."

In fact, the position of applicants-respondents through-

out was one of admission of the common control and management with a mere shrug of the shoulders. It was tantamount to an admission of such flagrancy as not to warrant disregard by the Commission. Central and its officers treated contemptuously with the jurisdiction of the Commission under 49 U.S.C. §5 and after having consulted with representatives of the Interstate Commerce Commission ignored their advice with respect to the requirements in the premises and the application of §5 to the issued involved.

For the first time, in *Potashnick Truck Service, Inc. Control-Bryant Truck Lines*, 5 M.C.C. 723, the Commission pointed out that the time for "leniency" in the enforcement of unlawful acquisition had passed. Thereafter, it treated with the violation in *Ziffrin Truck Lines, Inc.-Merger*, 37 M.C.C. 33, 38, and held that the violation of unlawful acquisition therein was not a bar because the violation occurred prior to *Potashnick* case, supra. *Hankison-Control-Mutual Trucking Co.*, 37 M.C.C. 617, accords with the *Potashnick* case, supra. In many cases thereafter the Commission denied Sec. 5 applications because of the unlawful acquisition involved. The general rule of the Commission appears to be as announced in *Coldway Food Express, Inc.-Control and Merger*, 87 M.C.C. 123 (130- to the effect that where the evidence shows a reckless and flagrant disregard for the Commission's authority, such violation of the law should not be rewarded or permitted to continue. Compare *L. Nelson & Sons Transp. Co.-Control and Merger*, 75 M.C.C. 45. The approval of the instant transaction was to "bless" the "reckless and flagrant disregard

for the Commission's authority", and does not comport with the general rule announced by the Commission.

On the other hand, it is recognized that the Commission has held that past violations of the Act, though properly to be considered in determining the fitness of an acquiring party applicant in a Sec. 5 proceeding, is not an absolute bar to approval of such an application, particularly if the transaction otherwise is shown to be consistent with the public interest. However, the Commission cases applying this rule have been instances wherein the violation was of safety regulations, was in another proceeding, or where there were extenuating or mitigating circumstances. In no case found has the rule as herein applied by Division 3 been applied by the Commission where there was a reckless and flagrant flaunting of the Commission's jurisdiction.

The burden of statutory proof was on the applicants in MC-F-7882 to establish, among other things:

(1) The transaction is consistent with the public interest.

(2) The effect of the proposed transaction upon adequate transportation service to the public.

(3) The total fixed charges resulting will not burden Central or Inland.

(4) The interest of carrier employees will not be affected.

(5) Full utility has been made of all involved operating rights.

The record before the Commission was silent with respect to these requisite matters of proof.

While consistency with the public interest is the ultimate to be established in a Sec. 5 proceeding, applicants did not undertake to show the effect which the grant of this application would have upon the public generally in the rendition of transportation service to or from Central points or to or from Inland points, nor did they undertake to establish the manner by which operations would be conducted in the future.

Applicants wholly failed to establish the effect which the proposed transaction would have upon adequate transportation service to the public.

No showing by applicants was made as to the effect of total fixed charges resulting, nor as to the interest of employees.

On the contrary, appellants made a substantial showing of resulting material ill-effect from the grant of MC-F-7882, that Inland had not been a formidable competitor until controlled by Central, that Central is an aggressive and substantial carrier and affords substantial competition, and that existing carriers have the ability to transport such involved tonnage.

No evidence was offered by applicants bearing upon the effect of the proposed transaction upon adequate transportation service to the public, other than the

testimony of Mr. Callan that he would be able to increase the tonnage of Inland. The increase in tonnage is not necessarily the guarantor of consistency with the public interest, nor does it result in bettering or otherwise assuring adequate transportation service to the public; on the contrary, as is shown by the affirmative evidence of appellants, the grant of this application would have a material ill-effect upon the operation of appellants and the service which they are now rendering to the public in the territory involved.

The refusal of the Commission to find that applicants failed to offer evidence and sustain the statutory burden of proof bearing upon the effect of the proposed transaction upon adequate transportation service to the public renders the orders complained of as arbitrary, capricious, and void.

The District Court summarily disposed of this issue by finding "that the Commission's finding approving the transaction is consistent with the public interest is supported by the record, and was not arbitrary, unreasonable nor an abuse of discretion" without giving any suggestion as to the basis for such conclusion.

Appellants are entitled to have the orders in MC-F-7882 of June 29, 1964 and October 20, 1964 annulled, enjoined, cancelled and set aside, and to permanently enjoin appellees from giving effect thereto.

Respectfully submitted,

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Of Counsel

CERTIFICATE OF SERVICE

I certify that I have served copy of the foregoing on all parties of record in the District Court by depositing a copy properly addressed with proper postage affixed in the U.S. mail.

Dated at Fort Worth, Texas, this 14th day of July, 1965.

_____

Reagan Sayers

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANONIO DIVISION

CIVIL ACTION NO. 3485

ALAMO EXPRESS, INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., AND SOUTHWESTERN MOTOR TRANSPORT INC., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., W. W. CALLAN, AND INLAND MOTOR FREIGHT LINES, INC., Defendants

Before BROWN, Circuit Judge, United States Court of Appeals, SPEARS, Chief Judge, District Court, and SUTTLE, District Judge.

SUTTLE, District Judge.

Plaintiffs brought this action to set aside, annul and enjoin orders of the Interstate Commerce Commission granting authority under Section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. §5(2)(a), to CENTRAL FREIGHT LINES, INC., to acquire control of INLAND MOTOR FREIGHT LINES, INC., through purchase of capital stock, and in turn to W. W. Callan, controlling stockholder of Central, by virtue of the transaction. Their main complaint is that

after they had won several prior rounds before the Commission as protestants to the Defendants' application for control, the Commission suddenly reversed itself and held against them and granted the orders in question to Defendants. Plaintiffs attack the final orders as being arbitrary, unsupported by the evidence, and in excess of the authority granted to the Commission by Congress. While the course of the litigation has been long, complex, and at times uncertain, we find nothing in the record to justify a reversal of the Commission's Orders, or a remand to it for any further consideration.

The main issue through the Commission proceedings ultimately came to be whether or not the split-off or separation of intrastate operating rights from interstate rights by INLAND to ALAMO and SOUTHWESTERN should result in denial of CENTRAL and CALLAN'S application to control INLAND. The separation of intrastate from interstate rights took place as follows: Blake Gillan, presently the principal stockholder of INLAND, acquired the capital stock of INLAND from James S. McNamara in December, 1957. McNamara had obtained the stock in early 1956 from J. H. Robinson, who prior thereto caused INLAND to lease its Texas intrastate rights to SOUTHWESTERN and ALAMO on long-term leases. Thereafter, Robinson personally acquired the reversionary interest in the rights leased to Alamo and Southwestern with the approval of the Railroad Commission of Texas. Since Robinson's death these reversionary interests have belonged to Robinson's Estate. SOUTHWESTERN and ALAMO are using

the described leased intrastate rights for the performance of interstate operations, under the "grandfather" clause of Section 206(a)(7) of the Act. The leased intrastate rights in question parallel most of INLAND'S certificated interstate rights. The plaintiffs contended, with success until the orders in question were granted, that this split-off contravened the policy of the Commission of declining to approve transactions where the severance of interstate and corresponding intrastate rights, previously operated by a single carrier, resulted in the creation of two rights and two operations in the place of one. The Commission eventually decided that the situation presented by the instant fact situation was controlled by an exception to this policy which relieved "non-offending" parties to the split-off of the prohibition, and approved the Defendants' applications.

HISTORY OF THE PROCEEDINGS

In October, 1960, the Commission on its own motion instituted an investigation under Section 5(7) of the Act to determine whether the control or management of INLAND had been effectuated by CENTRAL and CALLAN, principal stockholder and chairman of Central's Board of Directors. This case, Number MC-F-7682, is known as the Investigation Case.

In May, 1961, CENTRAL and CALLAN filed application under Section 5 of the Act to acquire control of INLAND through purchase of its capital stock. This case, Number MC-F-7882, is known as the Control Case.

In the Control Case, an application under Section

210(a)(b) of the Act for temporary control by CENTRAL of INLAND through management was approved by Commission Order on September 5, 1961. Because of common facts and issues, the Commission proceeded to dispose of both the control and investigation proceedings on the same record and in reports combining the actions.

In its first report, January 11, 1963, the Commission concluded that the control and management of INLAND in a common interest with CENTRAL had been effectuated and was in violation of Section 5(4) of the Act and had continued until September 5, 1961, when terminated by the grant of temporary control authority. The violation, however, was found not to be such as to preclude CENTRAL as being unfit to control INLAND, nor so aggravated as to prevent approval in the control case, *if it could otherwise be found to be consistent with public interest.* Because of the split-off, however, the application in the control case was denied and an order entered directing divestiture of stock in INLAND by the defendants herein.

In its second report, November 15, 1963, the Commission modified the Orders requiring divestiture to permit the respondents in the investigation case to employ any lawful means of preventing further violation without the necessity of complete divestiture. The reconsideration by the Commission of its divestiture order came as the result of the decision of the United States Supreme Court in *Gilbertville Trucking Company v. United States*, 371 U.S. 115 (1962),

which indicated that divestiture could often be too harsh a measure to obtain compliance with Interstate Commerce rules and regulations.

Finally, on June 29, 1964, the Commission reversed its prior order of denial and granted CENTRAL authority to control INLAND subject to a condition not in issue, based upon a finding that the individual applicants had not been responsible for the split-off, and that CENTRAL'S acquisition of control of INLAND would be consistent with the public interest, applying for the first time an exception to the Commission's policy against split-offs, which had been announced by the Commission in Shein's Express—Purchase—Leo Smith Forwarding Company, Inc., 80 M.C.C. 511 (1959). The last order of the Commission, dated October 20, 1964, found that the June 29, 1964, order was within the Commission's discretion and denied Plaintiffs' Petitions for Reconsideration.

SCOPE OF REVIEW

All parties are agreed as to limited scope of review here. Our duty is to determine whether the conclusions of the Commission "finds support in the record as a whole, ...' even though the Court would justifiably have made a different choice had the matter been before it de novo';" *NLRB v. Fant Milling Co.*, 360 U.S. 301, at 309 (1959); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1940); §10(e), Administrative Procedure Act, 5 U.S.C. §1009(e). If the Commission has made adequate findings which are supported by substantial evidence, this Court may

not set aside the orders even though it may disagree with such findings, *ICC v. Union Pacific R. Co.*, 222 U.S. 541, at 547 (1922); *Rochester Tel Corp. v. United States*, 307 U.S., 125, at 139, 140 (1939); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). "The wisdom and experience of (the) Commission, not of the Courts, must determine whether the proposed consolidation is 'consistent with the public interest' . . . if the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." *McLean Trucking Co. Inc. v. United States*, 321 U.S. 67, at 87 (1944).

We find that the Commission had the authority to reopen for reconsideration and to rescind or modify prior orders and did not abuse its discretion in so doing here; that the Commission's finding approving the transaction as consistent with the public interest is supported by the record, and was not arbitrary, unreasonable nor an abuse of discretion; and that the Commission's finding of no dormancy of INLAND'S operating rights is supported by substantial evidence.

CONTINUING JURISDICTION OF ICC

The plaintiffs' attack on the Orders of June 24, 1964, and October 20, 1964, as being in excess of Commission authority is without merit. The Interstate Commerce Act itself gives the Commission a continuing jurisdiction over its orders, thereby allowing it to modify and even rescind a great number of

them at any time, Sections 17(6),.17(7) and 221(b) of the Interstate Commerce Act. There appears to be no such cut-off date, after which the Commission could not rescind or modify its orders, as is found in the National Labor Relations Act, 29 U.S.C. §16c(e), which prevents such action by the agency after the filing of the administrative transcript with the reviewing court, *In the Matter of the National Labor Relations Board*, 304 U.S. 486 (1938); *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939). Similar action on the part of the Commission has been sustained by the Courts in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Sprague v. Woll*, 122 F. 2d, 128 (7th Cir. 1941, cert. denied, 314 U.S. 669); *Erie R.R. Co. v. United States*, 59 F. Supp. 748, 64 F. Supp. 162 (S.D. Ohio 1945).

In addition to the continuing jurisdiction granted to the Commission by Congress and approved by the Courts, we have in the instant case the fact that the Commission actually exercised such authority here by specifically delaying the effective date of its Orders, within which period the various parties before the Commission filed the various applications for reconsideration which have ultimately brought the litigation before us. Finally, we find that the Commission did not abuse its discretion in reconsidering the merits of the controversy in light of its exception to the policy against split-offs, because an application by the Defendants here as Plaintiffs prior to their having called such exception (as embodied in Shein's case) to the attention of the Commission might well have resulted in our dismissal of their petition for not hav-

ing exhausted the administrative remedies before the Commission, or a remand to it for the purpose of considering the exception, *Cf. Walker v. United States* 204 F. Supp. 918, 208 F. Supp. 388 (W.D. Tex. 1961). The fact that the Commission reconsidered the matter in light of the Shein exception without a three-judge court having said it should do so does not make its action in so doing arbitrary. Finding no abuse of discretion in applying a recognized exception which had not earlier been called to its attention, we have no reason to reverse or remand to the Commission; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, at 534, 535 (1946); *ICC v. Jersey City*, 322 U.S. 503, at 514 thru 518 (1944); *Carolina Scenic Coach Lines v. United States*, 59 F. Supp. 336, at 337, affirmed 326 U.S. 680 (1945); *Yourga v. United States*, 191 F. Supp. 373, at 376-378 (1961). On the contrary self-correction of its own errors through the use of judicial inventiveness and imaginative resourcefulness should be the aim of a well run administrative agency. *F.T.C. v. J. Weingarten, Inc.*, 336 F. 2d 687, 695-97 (5th Cir. 1964).

APPROVAL OF CONTROL

In view of the history of the litigation and the record before the Commission and this Court, we cannot say that the final action of the Commission in approving the control of INLAND by CENTRAL was unreasonable. The mere fact that the Commission had found on January 11, 1963, that the proposed control would not be consistent with the public interest did not prevent the Commission from later finding that it

would be, in view of the subsequent considerations brought to bear before the Commission. If supported by substantial evidence, the Commission's final order cannot be attacked solely because it may be, or seems to be, inconsistent with findings in other proceedings before it, *Virginian Ry. v. United States*, 272 U.S. 658, at 665, 666 (1926). The Commission's report of January 11, 1963, makes it clear that the main basis for denial of the control application was its general policy against approving split-offs. The initial report also stated that although the violation of the law (control) had been established in the investigation phase of the case, such violation was not so severe as to bar approval of the control application if it could otherwise be found to be consistent with the public interest. The Commission's policy against split-offs was held, however, to prevent approval. The report of November 15, 1963, was necessitated because of the Gilbertville case in which the Supreme Court indicated that divestiture, as previously ordered in the instant case, was often unnecessarily punitive instead of merely corrective, which was set out as the proper function of the Commission's exercise of power. The issue of whether or not to apply the general policy of the Commission against split-offs, or, on the other hand, to apply the one recognized exception to such policy, i.e., that applications resulting in approval of split-offs would not be automatically denied where the parties before the Commission were not directly responsible for such split-off, is one which we feel the Commission is as well if not better equipped to decide than is this Court. Having taken into consideration

the admonition of the Supreme Court in the Gilbertville case—to correct and not to punish—and having found that the parties before it had not been responsible for the split-off, and further that approval of the control by CENTRAL was a possible step toward permanent reunification of a significant part of the severed rights of INLAND which would be an improvement for the status quo, we cannot say that the orders of June 29, 1964, did not have a rational basis. We can also see why the Commission decided that the Yellow Transit Case, 65 M.C.C. 775, was not deemed to prevent approval, in view of the exception to the split-off doctrine expressed by the Commission in Shein's case, since there INLAND'S position was tainted by the split-off while the parties responsible for same still owned INLAND.

DORMANCY

The Commission's finding, starting with its report of January 11, 1963, and continuing on through its report of June 29, 1964, that the self-conducted operations of INLAND were not dormant appears to be supported by substantial evidence. The mere presence of the power of control over it by CENTRAL does not negate as a matter of law such finding.

All of the parties have litigated fully all of the issues of both law and fact and appear to have brought before the Commission all relevant factors and the results appear to be just and well founded upon the record brought before us. Since we find the Interstate Commerce Commission orders to be valid, we see no

reason to continue the injunction, 28 U.S.C. §2324, and, therefore, affirm the Orders of the Commission and hereby dissolve the temporary injunction.

Dated this 20th day of March, 1965.

/s/ John R. Brown
United States Circuit Judge

/s/ Adrian A. Speers
Chief Judge, U.S. District Court

/s/ D. W. Suttle
United States District Judge

A true copy of the original, I certify.

MAXEY HART, Clerk
By /s/ Frances Mosley
Deputy

[SEAL]

(A-12)

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
January 17, 1963

No. MC-F-7882[1]

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Decided January 11, 1963.

1. In No. MC-F-7882, application of Central Freight Lines, Inc., for authority to acquire control of Inland Motor Freight Lines, Inc., through purchase of capital stock, and, in turn, by W. W. Callan, through such acquisition of control, denied.
2. In No MC-F-7682, upon investigation, the control or management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., found to have been effectuated in violation of section 5(4) of the Interstate Commerce Act, but that such violation terminated September 5, 1961.

W. E. Cureton and *George Nokes* for respondents and applicants.

William W. Guild and *Lloyd R. Reader* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

[1]This report also embraces No. MC-F-7682, Central Freight Lines, Inc. —Investigation of Control—Inland Motor Freight Lines, Inc.

Edward O. Gaylord, Dan Felts, Thomas E. James, Rollo E. Kidwell, Ewell H. Muse, Jr., J. Malcolm Robinson, and *Reagan Sayers,* for protestants and interveners in support of the Bureau of Inquiry and Compliance.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, HUTCHINSON, AND GOFF HUTCHISON, COMMISSIONER:

The proceedings herein involved were heard on separate records and were made the subject of separate reports and recommended orders of the examiners. Exceptions were filed by respondents to the report and recommended order in No. MC-F-7682, herein called the *Investigation case,* and the Bureau of Inquiry and Compliance of the Commission, herein called the Bureau, and certain interveners replied. A request by respondents for oral argument was denied December 13, 1961. Exceptions also were filed by certain protestants to the report and recommended order in No. MC-F-7882, herein called the *Control case,* and applicants replied. By agreement of all parties of record, the transcript of testimony in the *Investigation case* has been incorporated by reference and made a part of the record in the *Control case.* The facts are common to both proceedings and the issues are interrelated and will be disposed of in a single report. Our conclusions differ from those of the examiner in the *Control case,* and, to some extent, from those of the examiner in the *Investigation case.*

In the *Investigation case,* the Commission, division

4, by order entered October 6, 1960, on its own motion, instituted an investigation under section 5(7) of the Interstate Commerce Act to determine whether the control or management of Inland Motor Freight Lines, Inc., of Corpus Christi, Tex.,[2] herein called Inland, in a common interest with Central Freight Lines, Inc., of Waco, Tex., herein called Central, "may have been effectuated and may be continuing in violation of Section 5(4) of the said Act." Inland, Central, W. W. Callan, principal stockholder and chairman of Central's board of directors, R. H. Linam, president of Central, and Blake Gillen, principal stockholder of Inland, were made respondents. A hearing was held at which the Bureau and respondents entered into a stipulation as to certain facts. Brown Express, a corporation, (Brown) and Red Arrow Freight Lines, Inc., (Red Arrow) both of San Antonio, intervened in support of the Bureau's position. Evidence was introduced by the Bureau and by Brown ann Red Arrow. Briefs were filed. The examiner's findings with respect to the ownership, organization, financial condition, and operations of Central and Inland, and the relationships of the respondents, are adopted as our own and will not be repeated herein except to the extent necessary for clarity.

In the *Control case*, by application filed May 29, 1961, after hearing in the *Investigation case*, Central seeks authority under section 5 of the act to acquire control of Inland through purchase of its outstanding capital stock for $94,200. By the same application, W. W. Callan seeks authority under the same section

[2]Unless otherwise indicated, all points mentioned herein are in Texas.

to acquire control of Inland through the transaction. A hearing was held at which Brown, Red Arrow, Southwestern Motor Transport, Inc. (Southwestern), and Alamo Express, Inc. (Alamo), opposed the application and introduced evidence. Robertson Tank Lines, Inc., appeared but withdrew its opposition.

On July 6, 1961, a motion of respondents to defer action in the *Investigation case* pending final disposition of the *Control case* was overruled. An application under section 210a(b) in the *Control case* for the temporary control by Central of Inland through management, was approved, upon reconsideration, by order issued September 5, 1961. On September 7, 1961, the report and recommended order of the examiner in the *Investigation case* was served finding generally that the control and management of Inland in a common interest with Central had been effectuated and was continuing in violation of the act. On September 9, 1961, Central exercised the temporary control authority granted in the *Control case*. Thereafter, on February 16, 1962, the temporary control authority was extended pending final determination of the application under section 5.

Central operates in interstate or foreign commerce, in part under certificates issued by this Commission in No. MC-30867 and numerous sub-numebered proceedings, and in part under the "grandfather" clause of section 206(a)(7),[3] of the act, herein for conven-

[3]Formerly conducted under the second proviso of section 206(a) of the act. When the proviso was repealed, effective October 15, 1962, authority for carriers engaged in operations thereunder to continue such operations was incorporated in paragraphs (7) (A) and (B) of amended section 206(a) 76 Stat. 911.

ience called the proviso. Its operations, as a motor common carrier, principally of general commodities, with exceptions, over regular routes in Texas, extend between Wichita Falls and Dennison on the north, Orange and Port Arthur on the east, Galveston, Houston and San Antonio, on the south, and Brownwood on the west, mainly via Fort Worth, Waco, Austin, and Beaumont, serving various intermediate and off-route points.

In *Central Freight Lines, Inc.—Control—Alamo Exp., Inc.*, 70 M.C.C. 610, decided August 5, 1957, herein called the *Alamo case*, an application of Central to acquire control of Alamo was denied. Thereafter, by report and order on further hearing, decided January 22, 1959, 75 M.C.C. 731, as modified by order of June 4, 1959, and as affirmed and clarified by supplemental report and order on further hearing, decided February 19, 1962, 90 M.C.C. 96, the Commission conditionally approved the acquisition by Central of control of Alamo as well as an amended plan whereby W. W. Callan would be substituted in lieu of Central as the purchaser of a non-carrier affiliate of Alamo. Sometime prior to the report and order of January 22, 1959, J. L. Walker, Alamo's principal stockholder, in *J. L. Walker v. Central Freight Lines, Inc., et al.*, Docket No. MC-116344, filed suit in a Texas Court [131st Judicial District, Bexar County, Tex.], to have the contract with Central declared a nullity. Central filed a cross-complaint for specific performance. J. L. Walker also filed complaint in the United States District Court for the Western District of Texas, San Antonio Division,

J. L. Walker v. United States, et al., Civil Action No. 2864, to set aside the order of the Commission of January 22, 1959, as modified and supplemented. The proceeding in the State court has been stayed pending disposition of the proceeding in the U. S. District Court. Thereafter, the District Court, with one judge dissenting, dismissed the complaint of J. L. Walker and sustained the reports and orders of the Commission. The Commission has postponed, until further order, the time within which the authority granted by the order of January 22, 1959, as modified and supplemented, may be exercised.

Inland operates[4], in interstate or foreign commerce, as a motor common carrier of general commodities, with exceptions, over regular routes, extending from Austin and Houston on the north, to Brownsville and Mission on the south, principally via San Antonio, Victoria, Corpus Christi, Falfurrias, Riviera, and Harlingen, serving a number of intermediate and off-route points. Inland's rights connect with those of Central at Austin, San Antonio, and Houston, and duplicate those of Central between Austin and San Antonio.

Gillen acquired the capital stock of Inland from James S. McNamara, now vice-president of Alamo, about December 1, 1957. McNamara acquired the stock in early 1956 from J. H. Robinson who, prior thereto, caused Inland to lease its Texas intrastate rights to Southwestern and Alamo on long-term

[4]Pursuant to a certificate issued in No. MC-4943, on October 30, 1956, which certificate reflected a change in corporate name from J. H. Robinson Truck Lines, Incorporated (Robinson), to Inland Motor Freight Lines, Inc.

leases. Subsequently, pursuant to order of the Railroad Commission of Texas, J. H. Robinson was authorized to acquire from a receiver for Inland the reversionary interest in the rights leased to Alamo and Southwestern. Southwestern and Alamo are utilizing the said leased intrastate rights for the performance of interstate operations under the proviso. The said leased intrastate rights parallel most of Inland's certificated interstate rights.

When McNamara acquired Inland's stock its rights were dormant. Although he revived the operations they were unprofitable and Inland became heavily indebted to Yellow Transit Freight Lines, Inc., herein called Yellow Transit. As a result, in early 1957, McNamara contacted R. H. Linam to see if Central was interested in buying Inland. Several meetings were held with Linam, Callan, and George Nokes, the attorney for Gillen since 1948, as well as the attorney for Central and Callan, and the husband of Callan's niece, but no agreement was reached primarily because of the purchase price and the belief that this Commission would not approve the transaction until Central first acquired Alamo, thereby permitting a reunification of the interstate and intrastate rights previously held by Inland. Later, in the same year, McNamara's doctors advised him to cease his motor carrier activities, and he subsequently entered into an agreement[5] to dispose of Inland to Yellow Transit.

[5]Pursuant to such agreement an application was filed with this Commission in No. MC-F-6741, *Yellow Transit Freight Lines, Inc.—Control and Merger—Inland Motor Freight Lines, Inc.*, on October 22, 1957. However, it was dismissed at the request of the parties on February 21, 1958.

At the same time, McNamara was negotiating with Nokes for the sale of Inland to an unknown principal. Also, on or about November 6, 1957, Callan called a regional official of the Commission and inquired if he could negotiate for the purpose of taking over the contract of Yellow Transit. He was advised that he could engage in such negotiations, if he desired. Shortly thereafter the said official was advised by Callan that discussions had been held with Yellow Transit.

In his negotiations with Nokes, McNamara was advised that he would be required to guarantee Inland's balance sheet, which he was unwilling to do. An audit was made of Inland's books and a meeting held in Nokes' office on November 24, 1957, at which McNamara learned that Gillen was the proposed purchaser of Inland's stock. A purchase price was determined and the parties signed an agreement the following morning. The next day Callan, Linam, Nokes, Gillen, and Central's traffic manager, appeared at the Commission's regional headquarters at Fort Worth to discuss the matter further. At that time Callan represented that Central no longer was interested in purchasing the stock of Inland because McNamara would not guarantee its balance sheet, but that Gillen was considering such a purchase; that Central was helping Gillen purchase the stock in order to keep it out of the hands of any long-haul competitor, and with the understanding Central might buy Inland at some future date; and that Central would advise Gillen in transportation matters, provide Inland with certain personnel on a loan basis, and work with it as an interline carrier. He stated that no contract then

existed for Central to acquire Inland from Gillen. McNamara later became concerned over the allowable deficit under his contract with Gillen and discussed the matter with Nokes. Those two then met with Callan and the president of Yellow Transit at Central's terminal in Dallas and an amendment was agreed to, including an arrangement for McNamara's name to remain on Inland's note, evidencing a bank debt for $75,000, for a period of six months. On November 30, 1957, McNamara, Nokes, Gillen and W. H. Johnson, Central's office manager, worked out the closing papers and Gillen took possession the next day.

The agreement, as amended, provided for a purchase price of $83,000, payable $2,000 in cash on transfer to Gillen of legal title to the stock, with the balance ($81,000) evidenced by Gillen's promissory note dated December 1, 1957, payable within 6 months, bearing interest at 5 percent. Physical possession of the stock was to remain with McNamara as security for Gillen's note, although details of certain financial aspects of the transaction are somewhat obscure.

It appears that Gillen had a net worth in excess of $100,000 at the time of purchase; that from the sale of an automobile agency and certain other properties he advanced $50,000 to Inland to liquidate outstanding debts, including approximately $50,000 owed to Yellow Transit; that he also advanced $19,000, secured from the sale of certain realty at Hubbard to Central for $30,517, subject to a lien of $11,517, which Central leases to others; that Central loaned $36,400 to Linam who made a series of non-interest bearing loans totalling that amount to Gillen for use

by Inland; that Central's loans to Linam were not evidenced by a note or other evidence of indebtedness; that Inland borrowed $81,000 from a bank at Waco, using its operating certificates as security, on Callan's assurance to the bank that Central would be willing to purchase them from the bank if Inland defaulted; that Central sold 2 tractors to Inland for $15,600 under a conditional sales contract which it assigned, with recourse, to a bank at Ft. Worth; and that Central also assigned its contract to purchase 5 trailers to Inland, and the latter obtained a purchase money loan of $27,235, secured by a chattel mortgage, and which trailers Central agreed to purchase in the event of default by Gillen.

The record further shows that Inland had no telephone listings except at Corpus Christi; that Inland leased trailers and obtained pickup and delivery service from Central at reduced rates; that one Central employee was loaned to Inland for 6 weeks to set up procedures and to manage Inland's office and another for 9 months to act as Inland's general manager and continued, for an additional period of 5 months, to devote 30 to 40 hours per week in handling Inland's loss and damage claims; that Central's employees regularly prepared Inland's monthly income and balance sheet statements; that Inland had offices located on Central's premises at Austin, San Antonio, and Houston, and all of its rating and billing work was done by employees of Central; that Inland was billed and charged monthly for the foregoing services and others, including vehicle repairs, fuel and oil supplies, and dock charges, with no real effort by Central

to collect the charges; that Inland's indebtedness to Central exceeds $84,500, evidenced in part by a promissory note of $77,096, on which no payments have been made; and that Gillen was assured by Callan of Central's proposal to seek to purchase Inland at a future date.

When Gillen took over the operations of Inland, it had terminals at Harlingen, Corpus Christi, and Houston, had 21 employees, and owned 4 operational tractors and 4 trailers. At the time of the hearing in the *Investigation case* Inland had 7 drivers and 3 office employees, all stationed at Corpus Christi.

It appears that at the time Gillen purchased the stock of Inland, Callan expected that Central would seek to purchase its operating rights within one year, and had no intention of involving Central in Inland's affairs beyond helping it to obtain loans, and providing it with advice and experience through loan of Central's employees. Unforeseen complications in the *Alamo case* necessitated the additional assistance previously described. The record shows that on June 7, 1958, about the time Inland obtained the $81,000 loan, Central's directors authorized it to purchase the certificates of Inland for $100,000. Thereafter, 3 different applications to effect the transfer were prepared but never filed with this Commission because the *Alamo case* had not been determined. Following institution of the *Investigation case* on October 6, 1960, Central and Gillen, on May 2, 1961, executed the agreement in the *Control case* whereby Central would purchase the outstanding capital stock of Inland for $94,200, presumably less the $36,400 loaned by Cen-

tral to Linam and thence to Gillen. The parties propose only a control by Central of Inland at this time, indicating that if and when Central receives a favorable conclusion of the *Alamo case*, steps will be taken to merge Inland into Alamo.

Under its temporary control of the operations of Inland, Central has provided Inland with terminal facilities at Austin, San Antonio, and Houston, and has caused it to reinstate terminal operations at Victoria, McAllen, Harlingen, and Brownsville. While it has terminated the services of Gillen and the office employees at Corpus Christi, which work Central employees now perform, Inland now has 12 employees, of which 4 are part-time agents, 5 are regular drivers and the others are part-time drivers. While no evidence was submitted in the *Control case* respecting the actual scope of the operations performed by Inland under the temporary control authority, Callan testified that savings in personnel, terminal charges, travel and legal expenses had been effected in an amount of $1,981 a month and aggregating in excess of $23,000 a year; that additional savings would be realized through Central's greater buying power; and that Inland would be further benefited as a result of better credit, newer equipment, and competent supervision.

In their exceptions to the findings of the examiner in the *Investigation case*, that it was reasonable to believe that Central, Callan, and Linam accomplished the control of Central and Inland in a common interest in violation of section 5(4) of the act, and that the violation should be terminated, respondents argue